Supreme Court, U.S.
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No. 93-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner, Employers Insurance of Wausau ("Wausau") seeks a writ of certiorari to reverse and remand the Eleventh Circuit's refusal to issue a writ of mandamus requiring the district court (M.D. Fla.) to exercise its jurisdiction over the bankruptcy court. Respondent, The Celotex Corporation ("Celotex") opposes review of the inaction of the courts below yet fails even to cite let alone seek to distinguish a single one of the eight controlling cases relied on in Wausau's petition (the "Petition").

Celotex makes two arguments. First, Celotex argues that this Court lacks authority as a matter of law to review the courts below. In so doing, Celotex wholly ignores the controlling precedent of Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), cited in the Petition (at 7,9). In Thermtron, this Court held decisively that appellate review of a remand decision by mandamus is appropriate if the district court did not remand based on a statutorily permissible reason. Here, Celotex does not contest that the district court denied leave to review the remand decision, never considered the statutory bases for remand, and the court of appeals declined to hear the appeal and denied mandamus.

Second, Celotex argues that "the bankruptcy court will decide the claim or cause of action that Wausau removed from the state court." Opp. Br. at 1. If viewed as a factual claim, Celotex is wrong and contradicts the record, since Celotex sought and obtained an order remanding the removed claim and concluding federal jurisdiction over the remanded adversary proceeding. Pet. App. 6a-8a. If viewed less literally, Celotex is arguing that the bankruptcy court will, in a different adversary proceeding, resolve the legal issues for which the bankruptcy court remanded this proceeding. Yet to state the argument is to refute it: the bankruptcy court should have consolidated the two

proceedings, avoiding piecemeal litigation and resolved the issue remanded to the state court rather than defer to the decision of the state court. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11, 19-26 (1983) (reversing district court stay of proceeding where such stay results in an essential part of the federal suit being litigated in a state forum).

The action at issue here was effectively removed from the federal system by an Article I court. The heart of Wausau's appeal is a simple and limited request that an Article III court review the merits of such remand, which the district court did not do here. Contrary to the assertion of Celotex that the bankruptcy court has not yet entered a final order (Opp. Br. at 3), the bankruptcy court's remand order was a final order and constitutional concerns require full review by an Article III court.[1]

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1. See In re Tarnow, 749 F.2d 464, 465 (7th Cir. 1984) (Posner, J.) (bankruptcy court order ending adversary proceeding was final order); Scherer v. Carroll, 150 B.R. 549 (D. Vt. 1993) (bankruptcy court remand order constitutes final order reviewable by district court); In re Atron Inc. of Michigan, 1993 U.S. Dist. LEXIS 6848, *3 (W.D. Mich. March 9, 1993) (remand order appealable as a final order); In re Tandem Enterprises, 124 B.R. 283, 284 n.2 (Bankr. N.D. Ill. 1991) (1990 amendment to Section 1452(b) "strengthens bankruptcy court authority to order remands by providing a clear and immediate avenue of appeal"); Brizzolara v. Fisher Pen Co., 1993 Bankr. LEXIS 1340, *20-21 (Bankr. N.D. Ill. Sept. 15, 1993) (effect of 1990 Amendments permits bankruptcy courts to enter final remand orders subject to district court appeal). See also In re Axona, 924 F.2d 31, 35 (2d Cir. 1991) (bankruptcy court's abstention order under 11 U.S.C. § 305, which contains bar of appeal to courts of appeal and Supreme Court similar to 28 U.S.C. § 1452, held to be final order appealable to district court and "[s]uch Article III review of bankruptcy court decisions removes any constitutional concerns"); In re Shell Oil, 966 F.2d 1130, 1132 (7th Cir. 1992) (order remanding case to state court is a "terminal disposition" so far as the federal courts are concerned).

Celotex's claim that the Eleventh Circuit and this Court lack jurisdiction due to the prohibition on appeals of bankruptcy remand decisions in 28 U.S.C. §1452(b) (Opp. Br. at 6) misses the point. Wausau's Petition ultimately seeks to have the district court review the remand order on the merits, something that was never done, not to have this Court or the court of appeals consider in the first instance whether remand is appropriate.[2]

In short, the district court applied the wrong standard of review when it utilized the test for interlocutory appeals found in 28 U.S.C. § 1292(b). The proper course of action would have been to examine the bankruptcy court's remand order on a de novo basis consistent with Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.33, 86 (1982); cf. Pet. at 9. As Celotex conceded in papers filed in the district court, review by a district court of a bankruptcy remand order is required to satisfy the constitutional concerns of Marathon. Failure to provide such de novo review denies a party -- here Wausau -- its right to an adjudication on the merits by an Article III court.

The extraordinary facts of this case show that a bankruptcy court has been allowed to adjudicate private rights and limit access to Article III courts without any substantive review by the district court or court of appeals. Celotex concedes that mandamus is appropriate to confine an inferior court to the lawful exercise of jurisdiction or to

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2. Contrary to the misleading statement on page 2 of the Opp. Br., Wausau did not initially bring a motion to the district court for leave to appeal. Wausau has consistently maintained that constitutional considerations dictate review by an Article III Court, and that the remand order was appealable to the district court as of right. The January 9, 1992 district court order resulted from that court treating Wausau's notice of appeal as a motion for leave to appeal and denying such motion pursuant to Fed.R.Bankr.P. 8003(c). Pet. App. 3a-5a.

compel it to act when it has a duty to do so where a clear abuse of discretion or conduct amounting to "usurpation of [the judicial] power" has been shown. Mallard v. U.S. District Court, 490 U.S. 296, 309 (1989); see Opp. Br. at 5; see also Thermtron. The unreviewed exercise of the judicial power of the United States by an Article I court that has occurred in this case is precisely the scenario to which Mallard applies. Therefore, the issuance of a writ of mandamus is necessary to instruct the district court to exercise its jurisdiction and review the bankruptcy court's remand order on the merits.

Respectfully submitted,

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